HISTORICAL BACKGROUND AND CONTOURS OF COMPETITION POLICY

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HISTORY

After independence, India chose a centrally planned economic structure which is well known as the Nehruvian Socialism model. The Nehruvian Model was a mixed economy model, a model that was neither a market economy like the United States of America nor a socialist economy one like the USSR. Under the mixed model, both the private and public sector co-existed.[1] As the model aimed more towards socialist pattern of economic growth with objective being "economic growth with social justice". Though, the result of such model was not that productive and a concerned Government, appointed a Committee in October, 1960 to look into the reasons of inequality in the distribution of income and levels of living (Mahalanobis Committee).[2] The MIC found a high level of concentration of economic power in over 85 percent of industrial items in India. The MIC also found that the then licensing policy in the country had enabled big business houses to secure a disproportionately bigger share of licenses resulting in pre-emption and foreclosure of capacity.[3] The MRTP Act was passed to enable the Government to control concentration of economic power in Indian industry.[4] The MRTP Act was notified in the year 1970, the MRTP Commission was set up.

THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

The Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter MRTP) act is considered as the predecessor of the competition Act and it was considered to be the operative competition law of India until it was repealed in the year 2009. Discussion of the MRTP is important so as to determine the context in which Indian legislature enacted new competition legislation. The preamble provided that the MRTP Act is an:[5]

Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The MRTP Act aimed at preventing (a) economic power concentration in a few hands and curbing monopolistic behaviour and (b) prohibition of monopolistic, unfair or restrictive traded practices. The intention behind this was both to protect consumers as well as to avoid concentration of wealth. Though the act was abolished and the High Level Committee was formed to draft the present act and the committee was known as Raghvan Committee.

THE COMPETITION ACT, 2002

In 1991, India began a project of economic liberalization. This move away from "command and control" economic principles culminated in an overhaul of the competition laws. In his 1999 budget speech, the finance minister explained, "The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition."[6]The Indian government appointed a High Level Committee on Competition Policy and Law, known as the Raghavan Committee, to evaluate the MRTP Act. The Committee's report 249 found the MRTP to be inadequate "for fostering competition in the market…and reducing… anti-competitive practices…".The Committee made a series of recommendations,[7] which prompted the Indian government to replace the MRTP Act with an entirely new act. Notably, the Committee recognized that substantial expertise would be necessary to institute an effective competition regime. The report explained, "...If the Competition Law Authority is to monitor mergers in India, it will have to be suitably equipped with adequate staff with relevant expertise in law, commerce, economics, and other relevant disciplines. Such expertise will inevitably

[1] Nishith Desai ,Competition Law in India- A Report on Jurisprudential Tends, 2015,*available at:* *http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition_Law_in_India.pdf* (Last visited April 4, 2016)
[2] Mehta Pradeep S, Competition and Regulation in India-Leveraging Economic Growth Through Better Regulation, *available at:* *http://www.cuts-ccier.org/icrr09/pdf/Competition-Regulation-India-CurtainRaiser09.pdf* (Last visited April 4, 2016).
[3] Dr. S. Chakravarthy, "India: Pros and Cons of Competition", 25 *International Business Law* 457 (1997).
[4] *Ibid.*
[5] The Monopolies and Restrictive Trade Practices Act, 1969.
[6] *Supra* note. 1 at 44-45.
[7] *Id.* at para 2.9.7.

take time to be developed as we are already seeing in the case of the new regulatory authorities that have been set up recently in the various infrastructure sectors."[8]

The Indian Parliament enacted the Competition Act ("the Act") in December 2002 and it received Presidential assent in January 2003. While the Act was enacted in 2002, Sections 3 and 4 were not ratified or enforced until 2009 and the Commission's first orders under Section 3 and 4 which deals with anti-competitive agreements and abuse of dominance, were not announced until February 2010. Sections 5 and 6, which pertain to mergers and acquisitions, were delayed further, two drafts of implementing regulations were notified and then withdrawn in the face of vehement criticism. A third set of regulations was notified in May and the merger provisions were finally given effect in June 2011. The Act was initially blocked by a lawsuit that challenged the constitutional validity of its provisions. A writ petition filed in the Supreme Court of India claimed that the head of the Commission must be a member of the judiciary because the Commission would exercise judicial powers. Despite its discomfort with the appointment of a retired civil servant as the head of the agency, the Supreme Court refrained from passing a definitive judgment because the government stated that it would amend the Act.[9] Accordingly, the Act was amended in 2007 in order to create a substantial role for the judiciary. The 2007 amendments created the Competition Appellate Tribunal (CAT), a three-member quasi-judicial body that must be led by a former judge of the Supreme Court or the Chief Justice of a High Court. In addition, the Chief Justice of the Supreme Court would have primary responsibility in selecting the members of the Committee.[10]The CAT has two primary responsibilities. First, any individual who wishes to contest an order made by the Commission must appeal to the CAT. Rulings made by the CAT can only be appealed to the Supreme Court. Second, the CAT determines compensation after a violation has been established.

Therefore, it was situation of dilemma where the commission was unable to take up the proper functioning and this gave leverage to those whose were beating the heat of competition. Nevertheless, when the commission became fully functional and was at its nascent stage, it is commendable that they indulge in proper investigation process and many companies came under the scanner of CCI.

THE CONTOURS OF COMPETITION POLICY

It is quite evident from the above discussion that the scope of competition policy is broad and essentially includes all governmental measures that directly affect the conduct and behaviour of enterprises and the structure of industry with the objective of promoting efficiency and maximising welfare. To the extent the implementation of Competition policy requires legal backing; there is need for a Competition Law.[11]Therefore, it is said that Competition Law has more specific focus and is, as a result, necessarily more limited in scope. Thus, whereas the competition policy covers whole array of executive policies and approaches, the competition law is a piece of legislative enactment having the character of enforceability in a court of law.

There are a number of laws that directly or indirectly have an impact on economic activity and competition. In other case, though, executive decision of the government does not have the legislative backing also impact on economic activity and competition behaviour. The focus of the competition law will be more on preventing anti-competitive behaviour that is welfare reducing. The basic premise is that free market work to provide the desired economic outcomes, but that markets can do this, only if the process of competition in these markets is protected from abuse. Therefore, the legitimate goal of Competition Law is the maximization of economic welfare.

It follows that Competition Law Authority (Competition Commission of India) will be governed by the principles of competition in its adjudicatory effort. In other words, primarily its objective will be to act as an effective instrument for engendering and protecting competition in the market in the interest of maximising national welfare. It deals effectively against specified anti competitive practices and have power to meet out deterrent punishment to those who violate its provision.[12] Thus, the CCI has the discretionary power as well as administrative power to impose penalty on those who breaches any provision of the act. As stated above, the underlying premise is that, in the presence of competition, the market will achieve the objective of maximising welfare. [13]Competition policy includes all governmental measures that have the objective of creating and sustaining the appropriate market environment.

OBJECTIVE OF THE POLICY

The major objective of the competition policy is that, in the presence of competition, the market will achieve the objective of maximising welfare. Competition policy includes all governmental measures that have the objective of creating and sustaining the appropriate market environment. The purpose of any Competition Law is to provide teeth to Competition policy, where this is necessary[14]. Generally a great deal of discretion is likely to exist in the administration and implementation of the policy and the law, in the name of public interest. Thus, the danger, as with any government intervention, is that this may lead to too much

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[8] *Id.* at para 4.7.9.

[9] *Brahm Dutt v. Union of India*, 2 SCC 431 (2005).

[10]Act 1 Scene 2: The Drama over India's Competition Law, ASIA LAW(2006), *available at:* http://www.asialaw.com/Article/1971451/Act-1-Scene-2-The-Drama-over-Indias-Competition-Law(last visited on April 5, 2016

[11] *Supra* note 25.

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

intervention and over regulation.[15] Therefore, in designing and administering the law, great care needs to be taken that the scope for necessary intervention and over regulation is minimised, as this would defeat the fundamental objective of consumer interest, for which the policy and the law are being created. The "public interest" dimension may have primacy over the consumer interest dimension in exceptional circumstances but such exception should be few and far between and should not be allowed to dilute competition. Any such exception should be laid on the floor of parliament with full justification for the same. Care should be taken not to allow "public interest" to be abused to circumvent competition.

CONCEPTUAL CONTOUR OF THE COMPETITION ACT

The focus of the law is on the three areas of enforcement that provides the focus for most Competition Law today:[16]

- Agreements among enterprises.
- Abuse of Dominance.
- Mergers or, more generally, Combinations among enterprises.

Although there are differences in emphasis and interpretation across countries, and over time within countries, the purview of the laws in most countries is generally limited to these three areas.

The Indian government, in the year 2002, gave commitment to streamline its competition law regime, at par with the western world. In western world, competition law and antitrust laws are used interchangeably. Many researchers and scholars have tried to bring forward and also observed that what principles would be beneficial for India to drive Competition Commission's enforcement agenda .This paper tries to unveil the various principles, theories, concepts on which the Competition law works and also throws light on the conceptual flow of topic covered in the present paper with a view to understand deeply the terminologies within the contour of Competition Law. It is, firstly very important to understand the concepts before entering into the main stream of issues and hardships faced by the Indian Competition Laws. Albeit competition Law being at its nascent stage therefore, it is *sin qua non* or at least significant to understand the concepts under the cloud of judicial interpretations. The competition Law contains number of terminologies which are differently tackled although the present chapter is not dealing with all the terms, and intends to give the picture of terms which are pertinent to understand the present study. The terms elaborately explained below are:

A. COMPETITION

The term "Competition" has neither been defined in the 1969 MRTP Act nor in the 2002 Competition Act, albeit the term "Competition" has been deduced from the term " Monopolistic Trade Practices" and " Unfair Trade Practices" as defined in the 1969 MRTP Act and term " Anti -competitive Agreements" in the 2002 Competition Act.

In plain language we can define the term "Competition" as the availability of the sufficient number of buyers and sellers in the particular market and the participants of the particular market have no influence on each other or any new entrant to that particular market with respect to the determination of the price of goods or services.

B. COMPETITION COMMISSION OF INDIA:

Under section 7 the central government has established a commission for the purposes of the Act to be known as the Competition Commission of India (CCI)[17]. The Commission is a body corporate under its name. It will have perpetual succession and a common seal. Subject to the provisions of the Act, the Commission has been given the power to acquire, hold and dispose of the property both movable and immovable. It has the capacity to contract and also to sue and be sued in its own name. Thus, all the powers of corporate personality have been conferred on the commission. They can also establish offices in other parts of India. Section 8(1) and 8(2) of the act deals with the number of members and the chairperson and the later deals with the qualification of chairperson and member. The other sections 9, 10 deals with the selection procedure and term of office which is five years[18]. The noteworthy section is section 16 where Central Government may, by means of a notification, appoint a Director General and also, as many Additional joint, Deputy or Assistant Directors General and such other officers or employees as it may deem think necessary for the purpose of assisting the Commission in conducting enquiry into contraventions and for conduct of cases before the Commission and for such other functions as may be provided.

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[15] *Ibid.*
[16] *Ibid.*
[17] The Competition Law, 2002.
[18] *Ibid.*

C. ANTI-COMPETITIVE AGREEMENTS

According to section 3[19] of the act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed anti-competitive. This section specifically deals with anti-competitive agreements, including cartels Section 3 (1)[20] of the Competition Act prohibits any agreement with respect to "production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India". Although the Competition Act does not define AAEC and nor is there any thumb rule to determine when an agreement causes or is likely to cause AAEC, Section 19 (3)[21]of the Act specifies certain factors for determining AAEC under Section 3 of the act. The substantive test for determining liability under the act is that of causing or likelihood of causing an AAEC in the relevant market in India. the act provide guidance under section 19(3) for determining as to what all agreements will constitute to AAEC on competition in Indian market. The language in section 19(3) states that the CCI shall have 'due regard to all or any' of the aforementioned factors. However, in *Automobiles Dealers Association v. Global Automobiles Limited & Anr.*[22], CCI held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3).

The Competition Act does not specifically categorise the two types of the agreement but reading section 3(3) and 3(4) makes it quite evident that the former is horizontal agreement and the later is vertical agreement. In USA, horizontal agreements are treated *per se* illegal agreement whereas in India it is presumed to have an "appreciable adverse effect on competition" (AAEC) and can be rebutted. In other words, the burden of proof is shifted for horizontal offenses, but otherwise, there is no real difference between

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[19] Section 3(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void. (3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which— (a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding (4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including— (6) (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Explanation.—For the purposes of this sub-section,— (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods; (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person; (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods; (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. (5) Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under— (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000); (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export

[20] *Ibid.*

[21] **Section 19(3)** The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:— (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[22] Case No. 39/2010.

horizontal agreements and other offenses.[23] The Supreme Court in *Sodhi Transport Co. v. State of U.P.*[24] as interpreted 'shall be presumed' as a presumption and not evidences itself.

Section 3(4) identifies vertical agreements that are subject to review under a rule of reason test. The Act requires the Commission to determine whether the vertical agreement will lead to an AAEC. By instituting this version of a rule of reason test, India has bypassed the U.S. common law evolution for vertical agreements. Section 3(4) specifically includes ties, exclusive supply and distribution agreements, refusals to deal, and resale price maintenance as within the Commission's jurisdiction. And Section 3(5) lists exemptions from the application of Section 3, which include conditions that protect intellectual property rights and export cartels (where the harm to competition is inflicted on foreign entities).[25] The act regulates arrangements between competitors. It contains specific prohibitions against cartel conduct. According to Section 2(c)[26] of the Act defines a 'cartel'.

Remedies and sanctions: Under the Act, the CCI has the power to impose penalty upon the producer, distributor, seller, trader or service provider participating in cartel, a penalty of upto three times its profit for each year of continuance of the cartel or 10% of the turnover for each year of continuance of such agreement, whichever is higher.

D. ABUSE OF DOMINANCE:

4. (1) No enterprise or group shall abuse its dominant position.
(2) There shall be an abuse of dominant position 4 (under sub-section (1), if an enterprise or a group-
(a) Directly or indirectly, imposes unfair or discriminatory—
(i) Condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service.
(b) limits or restricts—
(i) production of goods or provision of services or market there for or
(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
(c) indulges in practice or practices resulting in denial of market access
in any manner; or
(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.
Explanation.—For the purposes of this section, the expression—
(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—
(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.
(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.
6(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.

Explanation of sub- section 2 of section 4 defines the term 'dominant position' as means a position of strength, enjoyed by enterprise, in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.

MCX Stock Exchange v. National Stock Exchange Ltd[27], the CCI held that because the position of strength in other segments it was possible for NSE to waive transaction fee in CD segment and passed a cease and desist order and imposed a penalty of RS. 55.5 Crores.[28]

The European Court of Justice in *United Brands v. Commission*[29] defined the term "dominant position" as " a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of it consumers"

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[23] The Commission's analysis in FICCI - *Multiplex Association of India v. United Producers/ Distributors Forum & Ors*., confirms that the Commission will use a rule of reason test even when evaluating cartel cases.
[24] AIR 1986 SC 1099.
[25] Dorothy Shapiro, A Competition Act by India, for India: The First Three Years of Enforcement Under the New Competition Act
[26] Section 2 (c) …"cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;…
[27] Case No. 13/2009.
[28] Vinod Dixit, " Competiion Law : Critique" XLVII *Annual Survey of Indian Law Institute* , 164 (2011).
[29] (1978) ECR 207.

Section 19(4)[30] of the Act, enumerates the factors which are kept to be in mind by the CCI while determining whether an enterprise enjoys a dominant position or not.

Sub-section 2 of the section 4 clearly elaborates in which contingencies it amounts to an abuse of dominant position by an enterprise or group. If any enterprise or group imposes unfair or discriminatory condition in sale or price, limits or restrict production, technical or scientific development of goods or services, any practice consequently denial of market access, imposes contractual barriers and uses its dominant position in one relevant market to enter into other relevant market.

Remedies and Sanction: the caping of the penalty to be imposed on the seller , distributor, association should not exceed more that 10% of the turnover.

E. COMBINATION

Sections 5 and 6 regulate "combinations," which includes mergers, amalgamations, and acquisitions.[31] Combinations that cause or are likely to cause an AAEC in India are prohibited. Any combination that exceeds the monetary threshold limits specified in the Act must file a premerger notification with the Commission.[32]The Act uses a size of the entity test, measuring the combined size of the acquirer and the target against the threshold, which differs from the U.S., which uses a size of the transaction test. The Act also exempts transactions that take place entirely outside India with an insignificant local nexus and effect on Indian markets, acquisitions where the buyer holds no more than 15% of the enterprise for investment purposes, and intra-group reorganizations. The Act was also altered to include an additional threshold for Commission scrutiny based on the size of the acquired entity. No filing is required if the size of the target enterprise has less than INR 2.5 billion in assets in India and 7.5 billion in turnover in India.[33]

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[30] Section 19 (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:-
(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market; (k) social obligations and social costs;
(I) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry

[31] Acquisition is defined as "acquiring or agreeing to acquire, i) shares, voting rights, or assets of an enterprise or (ii) control over management or control over the assets of an enterprise." See Section 2(a) of the Competition Act. The definition of combination includes "acquiring of control by a person over an enterprise." Thus, a merger can be a combination between two existing companies but also the absorption of one company by another.

[32] A transaction is required to be notified only if the combined size of the acquirer and the acquired enterprise, upon completion of the transaction, meets the following jurisdictional monetary thresholds (at a conversion ratio of 1 USD = INR 53.12 approximately):
(a) Where the parties to the transaction have a cross-border presence,
(i) Globally: At least 3 billion dollars in assets 9 billion dollars in turnover on a group- wide basis, or at least 750 million dollars in assets or 2.25 billion dollars in turnover on an enterprise-wide basis and
(ii) In India, at least 141 million dollars in assets or 423 million dollars in turnover on a group-wise or enterprise-wide basis.
(b) In purely domestic transactions: At least 1.12 billion dollars in assets or 3.38 billion dollars in turnover on a group-wise bases, or at least 282 million dollars in assets or 847 million dollars in turnover on an enterprise wide basis."Group" is defined to include all controlling entities, controlled entities, and all entities under common control. The definition of "enterprise" includes subsidiaries.

[33] Rahul Singh, India's Tryst with 'The Clayton Act Moment' and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics" *available at:* http://stanford.universitypressscholarship.com/view/10.11126/stanford/9780804785716.001.0001/upso-9780804785716-chapter-16. (Last Visited February 20, 2016)

For the purpose of this paper, the imposition of penalty on combination has not been discussed.

CONCLUSION

Nevertheless, commission was very active after the year 2010 and also took a good level of investigation but almost in maximum cases either the order of the commission were challenged in COMPAT and when asked for reason by the COMPAT, the Commission did not have adequate reasons for such penalty. Therefore, it is not the need of an hour to adopt penalties but important to adopt because adoption of set guidelines for imposition of penalty give clarity at all level and leads to better deterrence. The major question is if the objective is not achieved then what the use of imposing fines.

In various cases such as *M/s. Excel Crop Care Limited v. Competition Commission of* India[34]where the court came forward and asked the commission to apply the principle of proportionality and take into consideration various other factors which commission was ignorant about. In other cases also the court asked the commission to calculate the fine on the basis of relevant turnover instead of total turnover. The Appellant tribunal and the Supreme Court implicates for the adoption of the guidelines as it is very successful in other mature jurisdictions such as United States, European Union and United Kingdom.

In India, after completion of the inquiry, the CCI under the Act can direct the delinquent party (a) to discontinue (cease) and not to re-enter such agreement or discontinue abuse of dominant position (desist); (b) impose penalty up to three times of the profit or ten percent of average turnover of the last preceding three financial years, whichever is higher; (c) direct the amendment/ modification of the agreement;[35](d) direct division of undertaking of such delinquent party.[36]

Further, in case of violation, individual officers of company responsible for the conduct of business of company are also deemed to be guilty of that violation and are liable to be proceeded against and punished accordingly;[37]

Additionally, affected party(s) can approach the Competition Appellate Tribunal for award of compensation,[38]which can be quite large depending on the kind of violation involved.

It is seen that the CCI has come heavily on the violators of the Competition Act by imposing a penalty of more than Rupees Nine Thousand Eight Hundred Crore, during the last three financial years. Thus, the focus of competition laws in India has changed from the earlier "Reformative punishments" under the MRTP Act where no penalties were imposed to "Deterrent punishments" under the Competition Act where hefty penalties are being imposed.

How to avoid such hefty penalties under the Competition law is always a moot question for a law abiding enterprise. It is well said that preventive actions are always advisable as the ignorance of law is no excuse (*ignorantia juris non excusat*). Therefore, the Compliance of the Competition law becomes necessary as a legal obligation for every enterprise.

Competition law compliance implies a system based and active approach to run a business in compliance with the written legal and unwritten ethical rules of competition and minimise risk of infringement of the law. When the enterprise takes certain necessary and concrete steps to ensure that knowingly or unknowingly it does not infringe the provisions of the Competition Act, it can be stated to maintain a Competition Compliance Programme (CCP). The main objectives of CCP are (i) Prevent violation of competition law; (ii) Promote a culture of compliance; and (iii) Ensure good corporate citizenship.

Apart from the trends set out in cases like *Kerala Cine Exhibitors Association v. Kerala Film Exhibitors Federation & Ors.*[39] (‘Kerala Film Exhibitor Case’) CCI has not set out an overarching, coherent penalty framework. It is clear that CCI has the power to provide penalty guidelines. In particular, CCI has provided relatively detailed penalty guidance in its Leniency Policy.[40] It is a widely accepted position that penalty guidelines are a key tool in engendering a culture of compliance with competition laws, by increasing transparency and good enforcement principles. The International Competition Network (‘ICN’) has recognised that penalty guidelines reduce uncertainty, encourage enterprises in arriving at a rational decision about whether or not to become involved in activities contravening competition laws.[41] With the primary aim of deterrence, it would enable enterprises to determine

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[34] Appeal no.79/2012.

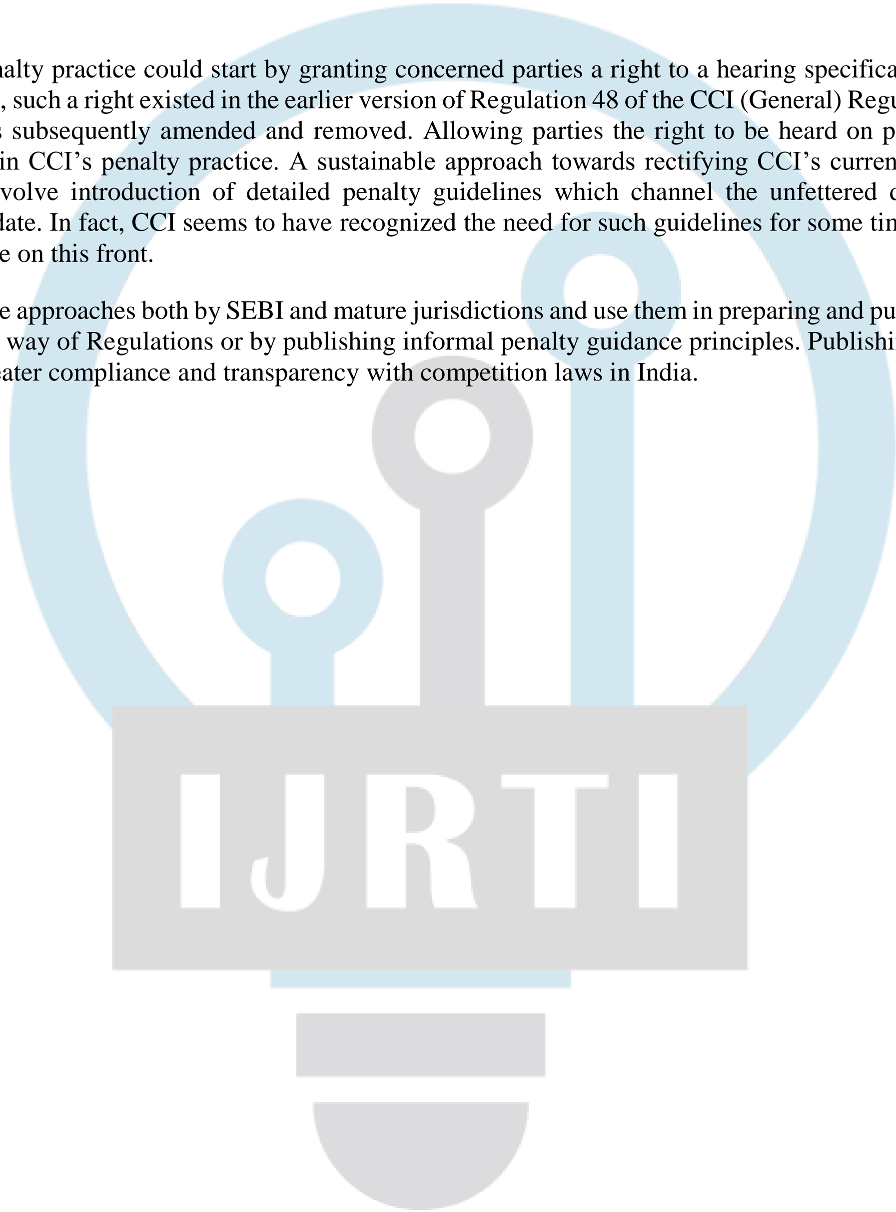
[35] The Competition Act, 2002, s. 27.
[36] The Competition Act, 2002, s. 28
[37] The Competition Act 2002, s. 48.
[38] The Competition Act, 2002, s. 53(n).
[39] Case no. 16/2014.
[40] The Leniency Policy, 2009, *available at* http://www.cci.gov.in/sites/default/files/regulation_pdf/regu_lesser.pdf. (Last Visited April 20, 2016).
[41] Antitrust Enforcement in Regulated Sectors Working Group (April 2004), *available at:* http://www.internationalcompetitionnetwork.org/uploads/library/doc380.pdf. (Last Visited April 20, 2016).

that the potential costs of participation in anticompetitive activities outweigh the potential rewards accrued. Therefore, penalty guidelines ultimately encourage greater and more efficient investments and competitive markets.

The generally accepted principles which inform penalty guidelines issued by mature antitrust enforcement agencies (e.g. in the European Union and United States) include a consideration of statutory limits, gravity of offences, recidivism of contravening enterprises, and extent of cooperation in investigations, among other factors. Apart from listing out appropriate mitigating and aggravating circumstances, penalty guidelines ideally contain a basic quantum which is determined with regard to the value of commerce affected by the impugned conduct.
Indeed, the Ministry of Finance in India has put in place rules incorporating factors that adjudicating officers of the Securities and Exchange Board of India ('SEBI') must have due regard to when adjudging the quantum of penalty. These factors include the amount of disproportionate gain or unfair advantage made, the amount of loss caused, and the repetitive nature of the conduct. This approach, mandated on SEBI adjudicating officers in India, is similar to the approach mature jurisdictions take in relation to antitrust violations.

A reform of CCI's penalty practice could start by granting concerned parties a right to a hearing specifically on determination of penalty amount. In fact, such a right existed in the earlier version of Regulation 48 of the CCI (General) Regulations, 2009 ('General Regulations'), but was subsequently amended and removed. Allowing parties the right to be heard on penalties would serve to increase transparency in CCI's penalty practice. A sustainable approach towards rectifying CCI's current penalty jurisprudence should ideally also involve introduction of detailed penalty guidelines which channel the unfettered discretion enjoyed, and exercised, by CCI till date. In fact, CCI seems to have recognized the need for such guidelines for some time now, even though no progress has been made on this front.

CCI should consider the approaches both by SEBI and mature jurisdictions and use them in preparing and publishing its own penalty guidelines, whether by way of Regulations or by publishing informal penalty guidance principles. Publishing penalty guidelines is likely to encourage greater compliance and transparency with competition laws in India.



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